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No. _____

In The

Supreme Court of the United States

October Term 1982

ALTON BASKERVILLE,

Petitioner,

v.

CHARLES SYLVESTER STAMPER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is Exhaustion Of State Remedies Required Under *Rose* v. *Lundy*, 50 U.S.L.W. 4272 (U.S. March 3, 1982) Where The State Has Waived That Defense?

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OPINIONS BELOW

The opinion of the Court of Appeals from which certiorari is sought is an unreported order dated October 4, 1982, and is included herein as Appendix A. The opinion of the District Court is reported in 531 F.Supp. 1122 (E.D. Va. 1982).

JURISDICTION

The opinion of the Court of Appeals was handed down on October 4, 1982. The jurisdiction of this Court to issue the writ of certiorari in this case is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On November 17, 1979, Charles Sylvester Stamper was convicted *inter alia* of three charges of capital murder and sentenced to death in the electric chair. Stamper appealed these convictions to the Virginia Supreme Court by way of direct appeal which was affirmed by written opinion at 220 Va. 260, 267 S.E.2d 808 (1979).

Stamper then filed a petition for a writ of habeas corpus in the Circuit Court of Henrico County which was denied by an order dated November 4, 1980. The Virginia Supreme Court denied the appeal of this petition by an order dated November 20, 1981 (Record No. 81-0359).

Thereafter Stamper filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia on January 19, 1982. The original petition contained only those allegations which had been presented to the Virginia courts. The Court appointed separate counsel to investigate possible claims of ineffective assistance of counsel, and an amended petition for a writ of habeas corpus was thereafter filed, raising allegations of ineffective assistance of counsel. A motion to dismiss the unexhausted claims was filed by your Petitioner but was denied by the Court. On February 5, 1982, a plenary hearing was held on the issues of ineffective assistance of counsel, and on February 12, 1982, the District Court entered judgment denying the petition for a writ of habeas corpus on all claims.

Stamper appealed the denial of the petition for a writ of habeas corpus to the United States Court of Appeals for the Fourth Circuit, and the Fourth Circuit, on March 4, 1982, ordered briefing and oral argument. Briefs were filed and the case was set for oral argument on October 6, 1982. Prior to oral argument, however, the Court of Appeals en-

tered an order (App. A), remanding the case to the District Court for dismissal pursuant to *Rose* v. *Lundy*, 50 U.S.L.W. 4272 (U.S. March 3, 1982).

A motion for stay of mandate was filed in the Court of Appeals which was denied by an order dated October 15, 1982 (App. B).

On October 25, 1982, your Petitioner filed a formal waiver of exhaustion in the District Court (App. C), and a motion for stay pending this petition for certiorari (App. D).

ARGUMENT FOR GRANTING CERTIORARI

When the original petition for a writ of habeas corpus was filed, the Petitioner had exhausted his state court remedies. The District Court sought to avoid piecemeal litigation by appointing additional counsel to investigate possible claims of ineffectiveness of counsel. When said claims were presented in an amended petition, the Court proceeded to decide the entire case over your Petitioner's objection for failure to exhaust state remedies.[1]

After the plenary hearing, the state determined that the District Court had fully and fairly decided the issues and no longer pursued the defense of exhaustion when the Petitioner below appealed to the Fourth Circuit. Indeed, the state argued on brief in the Fourth Circuit that it had waived exhaustion of state court remedies. There was no cross appeal by the state or assignment of error that the District Court erred in failing to dismiss for non-exhaustion.

The exhaustion doctrine is based on comity, not jurisdiction. *Fay* v. *Noia*, 372 U.S. 391, 420 (1963). It exists

[1] Until *Rose* v. *Lundy* was decided, the rule in the Fourth Circuit was that only unexhausted claims would be dismissed. *Hewet* v. *North Carolina*, 415 F.2d 1316, 1320 (4th Cir. 1969).

to avoid unnecessary conflicts between the state and federal court, and to avoid unnecessary litigation. *See, generally, Galtieri* v. *Wainwright,* 582 F.2d 348 (5th Cir. 1978). Where the state has persisted in advancing its claim that a petitioner has failed to exhaust his state court remedies, and where a federal court has granted a petitioner relief without exhaustion of state court remedies, this Court has required exhaustion of state court remedies. *Pitchess* v. *Davis,* 421 U.S. 482 (1975); and *Picard* v. *Connor,* 404 U.S. 270 (1971).

In *Rose* v. *Lundy,* this Court reviewed the principles behind the exhaustion requirement. The exhaustion doctrine exists to allow the state to have the first opportunity to correct federal constitutional error and minimize federal interference and disruption of state court judgments. The exhaustion requirement serves to reduce piecemeal litigation. In *Rose,* this Court said:

> The exhaustion doctrine is principally designed to protect the state court's role in the enforcement of federal law and prevent disruption of state judicial proceedings.

50 U.S.L.W. at 4275.

The policy reasons for requiring exhaustion are not applicable in this case. Your Petitioner believes that the Court of Appeals erred when it failed to consider the state's waiver of exhaustion.[2] Exhaustion of state court remedies may be waived. *See Barksdale* v. *Blackburn,* 670 F.2d 22, 24 (5th Cir.), *cert. denied,* —— U.S. —— (1982); *Collins* v. *Auger,* 577 F.2d 1107 (8th Cir.), *cert. denied,*

[2] Petitioner points to the fact that the District Court conducted a full plenary hearing, and the Court of Appeals ordered briefing and argument. These expenses should have been considered by the Court of Appeals in its failure to accept the waiver argument.

439 U.S. 1133 (1978); *Harding* v. *State of North Carolina*, 683 F.2d 850 (4th Cir. 1982); *Jenkins* v. *Fitzberger*, 440 F.2d 1188, 1189 (4th Cir. 1971); and *Van Poyck* v. *Wainwright*, 595 F.2d 1083 (5th Cir. 1979).

The Fourth Circuit erred when it remanded this case to the District Court when your Petitioner did not request it. The state's waiver of exhaustion should have ended this issue. In *Robinson* v. *Wade*, 686 F.2d 298, 303, n. 8 (5th Cir. 1982), the Court said:

> Waiver of exhaustion, implied by this Court from the simple failure vigorously to assert the state remedies remain untried, . . . is certainly accepted when explicitly made. (Citations omitted).

Indeed, in *Hopkins* v. *Jarvis*, 648 F.2d 981, 983, n. 2 (5th Cir. 1981), the Court found a waiver of state remedies where the state had pled lack of exhaustion at the magistrate level, and failed to reassert exhaustion at the district court level:

> In this case, appellee did raise lack of exhaustion in its answer to the habeas petition; once the magistrate found that appellant had exhausted state remedies, appellee did not raise exhaustion before the district court in its review of the magistrate's report and recommendation. Moreover, appellee has not mentioned exhaustion in his brief or argument before this court. We conclude, therefore, that appellee has waived the defense of lack of exhaustion.

Similarly, your Petitioner contends that its failure to raise the defense of exhaustion in the Court of Appeals amounted to a waiver of that remedy. *Cf. Wilkes* v. *Israel*, 627 F.2d 32, 38, n. 10 (7th Cir.), *cert. denied*, 449 U.S. 1086 (1980).

The reasons underpinning the *Rose* v. *Lundy* decision are not present in this case. Not only has the state been required to participate in a plenary hearing, but also it has been required to brief the issues in the Court of Appeals. The state should have the right to abandon its initial claim of exhaustion if it so desires. Indeed, in this case the state filed an explicit waiver of exhaustion in the District Court after it was remanded by the Court of Appeals.[3]

Exhaustion of state remedies inures to the benefit of the state; the state should be able to waive it. In a case where the state is willing to give up the right to have state remedies exhausted and does not insist on exhaustion of state remedies, exhaustion should not be required. Because none of the reasons which have traditionally required exhaustion of state remedies are present in this case, this Court should consider the state's waiver of exhaustion and look to judicial economy and require the Court of Appeals to decide this appeal. In the posture of this case, the decision of the Court of Appeals amounts to a waste of judicial economy.

[3] This waiver has not yet been acted upon by the District Court.

CONCLUSION

The requirement of exhaustion of state court remedies is a benefit which inures to the state, and the Court of Appeals erred when it summarily remanded this case to the District Court for dismissal in light of *Rose* v. *Lundy*. Your Petitioner did not assert exhaustion of state court remedies in the Fourth Circuit and argued that it had waived state court remedies in that Court. In the interests of judicial economy, this Court should grant certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Thomas D. Bagwell, Assistant Attorney General of Virginia, Counsel for Petitioner, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the ... day of December, I mailed a copy of the foregoing Petition for Writ of Certiorari to Gary J. Spahn, Esquire, MAYS, VALENTINE, DAVENPORT & MOORE, P. O. Box 1122, Richmond, Virginia 23208, Counsel for Respondent.

THOMAS D. BAGWELL
Assistant Attorney General